

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 7272

DANIEL J. FOREST as LIEUTENANT
GOVERNOR OF NORTH CAROLINA
and a MEMBER OF THE NORTH
CAROLINA COUNCIL OF STATE,

Plaintiff,

v.

ROY ASBERRY COOPER, III, in his
official capacity as GOVERNOR OF
NORTH CAROLINA,

Defendant.

**ORDER ON MOTION FOR
PRELIMINARY INJUNCTION**

I. INTRODUCTION

1. THIS MATTER is before the Court on Plaintiff's Motion for Temporary Restraining Order ("TRO") (the "Motion") which the Court now treats as a motion for preliminary injunction with the parties having been given notice and having filed briefs and affidavits before the Court heard oral argument. The essence of the Motion is that Lieutenant Governor Forest ("Plaintiff," "Forest," or "Lieutenant Governor") seeks to enjoin the further application or enforcement of a series of executive orders issued by Governor Roy Cooper ("Defendant," "Cooper," or "Governor"), which the Lieutenant Governor refers to collectively as the "Shutdown Orders," and the Court refers to collectively as the "Executive Orders," unless a majority of the Council of State concurs in them (the "Executive Orders" include Executive Order Nos. 118, 121, 135, 138, 141, 147, 153, and 155).

2. This Order addresses only issues necessary to resolve the Motion. The Motion presents the central issue as whether the Governor must issue emergency executive orders of state-wide application in response to the COVID-19 pandemic only with the concurrence of the Council of State. At least for purposes of the Motion, the Lieutenant Governor accepts that the General Assembly has delegated executive authority to the Governor to issue the Executive Orders pursuant to the North Carolina Emergency Management Act, Chapter 166A, Article 1A of the North Carolina General Statutes (“Emergency Management Act,” “EMA,” or the “Act”), so long as they are issued with the concurrence of a majority of the Council of State. The Motion does not address, and the Court does not consider, whether the prohibitions and restrictions within the Executive Orders are overly broad, are unnecessary to respond effectively to the health and economic effects of the COVID-19 pandemic, or withstand challenge on other legal grounds not presented in the Complaint.

3. The Governor concedes that he relies only on the Emergency Management Act as authority to issue the Executive Orders and does not invoke any other constitutional, statutory, or common law authority. The central issue then devolves to a matter of statutory construction as to the manner in which the General Assembly has delegated executive authority to the Governor and the extent, if any, to which the validity of the challenged Executive Orders requires the concurrence of a majority of the Council of State.

4. Having considered the Motion, briefs, complaint, declarations, other materials submitted in support of and in opposition to the Motion, the relevant

authorities, and the arguments of counsel at the hearing held via videoconference on August 4, 2020 (the “Hearing”), for the reasons discussed below, the Court concludes that the Lieutenant Governor has not demonstrated that he is likely to succeed on the merits of his claim that the Governor has exceeded his statutory authority when issuing the challenged Executive Orders in his discretion and without the concurrence of a majority of the Council of State. Accordingly, the Court DENIES the Motion.

II. PROCEDURAL HISTORY

5. The Lieutenant Governor commenced this action on July 1, 2020, by his Complaint which included the Motion, phrased as a motion for TRO. He filed a brief in support of the Motion on July 8, 2020. (ECF No. 3.)

6. The Complaint requested the case be designated as exceptional pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts (“Rule 2.1”). (Compl. ¶ 8.) On July 14, 2020, the parties filed a Joint Motion recommending the case be designated as exceptional under Rule 2.1. (ECF No. 4.) The case was so designated and assigned to the undersigned on July 20, 2020. (ECF No. 1.)

7. On July 29, 2020, Governor Cooper filed his brief in opposition to the Motion, (ECF No. 7), along with declarations of D. Jordan Whichard IV, Director of Intergovernmental Affairs in the Office of the Governor (“Whichard Decl.”) (ECF No. 6.1); Erik A. Hooks, Secretary of the N.C. Department of Public Safety (“Hooks Decl.”)

(ECF No. 6.12); and Elizabeth Cuervo Tilson, MD, MPH, N.C. State Health Director and Chief Medical Officer (“Dr. Tilson Decl.”) (ECF No. 6.13).

8. On July 31, 2020, the Lieutenant Governor filed his Reply to Defendant’s Brief & Responses to the Court’s Questions, with supporting documents, including the organizational chart of the North Carolina State Government and legislative history regarding the North Carolina Emergency Management Act, N.C.G.S. §§ 166A-19–19.79. (ECF No. 8.)

9. On July 31, 2020, Governor Cooper filed a Motion to Dismiss Plaintiff’s Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure for lack of standing and failure to state a claim upon which relief could be granted. (ECF No. 9.) The Court does not presently consider the Governor’s Motion to Dismiss.

10. The Court heard arguments of counsel on August 4, 2020, after which it took the Motion under advisement.

III. THE CHALLENGED EXECUTIVE ORDERS

A. An Overview of the Emergency Management Act

11. The Court addresses provisions of the EMA in more specific detail later in its Order, but a summary of the Executive Orders being challenged is best understood with an initial appreciation of the broad context of the Act.

12. The EMA sets forth both the authority and responsibility of the Governor, State agencies, and local governments to prepare for, prevent, or respond

to an emergency. N.C.G.S. § 166A-19.1. The EMA grants powers in addition to, and does not restrict, other gubernatorial powers. N.C.G.S. § 166A-19.2.

13. An “emergency” is defined to include an imminent threat of widespread or severe injury or loss of life and extends to the “emergency area” defined by the declaration of the emergency. N.C.G.S. § 166A-19.3(6), (7).

14. Multiple sections of the EMA grant the Governor these additional emergency powers. Section 19.10, entitled “Powers of the Governor” includes a broad grant of both responsibility and authority. The Governor has overall responsibility to carry out the EMA and is authorized and empowered to control the State Emergency Management Program, except as to provisions vesting powers and duties exclusively in local governments. N.C.G.S. § 166A-19.10(b)(1). To do so, the Governor is given authority to make, amend, or rescind orders, rules and regulations within the limits of his authority. N.C.G.S. § 166A-19.10(b)(2). He is authorized to assume operational control over all, or any part of, the emergency management functions within the state. N.C.G.S. § 166A-19.10(b)(10).

15. Section 19.20 grants authority to either the Governor or the General Assembly to declare an emergency and to define the area within which the emergency exists. Local legislative bodies also have power to declare an emergency, but only within the confines of their geographic jurisdiction. N.C.G.S. § 166A-19.22.

16. Section 19.30 is entitled “Additional Powers of the Governor during State of Emergency,” and significantly contains three subparts. The first subpart, subsection (a) grants certain administrative authorities to mobilize state resources,

direct law enforcement, and expedite permitting. The Motion centers on the interpretation of powers granted or limited by the other two subsections of Section 19.30.

17. The second subsection is Section 19.30(b) which defines seven enumerated powers that the Governor may exercise during a declared state of emergency when acting “with the concurrence of the Council of State.” The EMA does not define what constitutes “concurrence” or any procedure by which such concurrence must be obtained.

18. The third subsection is Section 19.30(c) which vests the Governor with powers “in addition to other powers conferred upon the Governor by law.” These powers may be exercised by the Governor “in his discretion,” within “the emergency area,” and include the power to impose “prohibitions and restrictions,” the power for which is otherwise vested in local governments pursuant to Section 19.31.

19. The Governor is granted these additional powers under Section 19.30(c) only if he determines that one of four conditions have been met, which demonstrate that local control of the emergency is insufficient to protect lives and property. The four conditions are: (1) not all local authorities have enacted appropriate ordinances; (2) not all local authorities have implemented steps to effectuate control over the emergency under enacted ordinances; (3) local control measures are uncoordinated in an emergency area spreading across jurisdictional boundaries, severely hampering efforts to protect lives; and (4) the scale of the emergency is so great that local authorities are incapable of coping with it. N.C.G.S. § 166A-19.30(c).

20. The Court then summarizes the Executive Orders which the Lieutenant Governor contends can be given effect only with the Council of State's concurrence.

B. The Chronology of the Executive Orders at Issue

21. Governor Cooper has issued a number of executive orders for which he sought and obtained concurrence of a majority of the Council of State. Those orders are not relevant to the Motion except to the extent that the Lieutenant Governor argues that they clearly demonstrate the Governor's understanding that he was expected to act in consultation with the Council of State and elected to rely on separate authority under Section 19.30(c) of the EMA only when a majority of the Council of State refused to concur in the Governor's decision to limit the sale of food and beverages to take out service only. The orders in which the Council of State concurred include Executive Order No. 117, which closed public schools statewide; sections 14, 15, 16, 18, 20, and 22 of Executive Order No. 116, which declared a state of emergency; sections 2 and 3 of Executive Order No. 118, which made unemployment benefits more widely available; section 1 and 4 of Executive Order No. 119, which waived restrictions on child care and elder care and provided the N.C. Department of Motor Vehicles with flexibilities; Executive Order No. 124, which prohibited utilities from disconnecting customers unable to pay and from collecting fees for late payments during the COVID-19 pandemic; Executive Order No. 129, which created more flexibility in law enforcement training during the state of emergency; Executive Order No. 130, which provided more access to health care beds, expanded the pool of health care workers, and ordered essential child care services

for workers responding to the COVID-19 pandemic; Executive Order No. 131, which issued stronger social distancing requirements for retail stores, made earlier COVID-19 guidelines mandatory for nursing facilities, and issued changes to speed up certain unemployment benefits; Executive Order No. 139, which provided additional regulatory flexibility in the state’s health care system; Executive Order No. 142, which extended the prohibition of utility shut-offs and implemented a moratorium on evictions; Executive Order No. 144, which extended certain North Carolina Department of Health and Human Services (“NCDHHS”) provisions in Executive Order No. 130; Executive Order No. 148, which reissued prior executive orders on remote shareholder and nonprofit meetings during the COVID-19 state of emergency; and Executive Order No. 152, which extended certain NCDHHS provisions in previous executive orders and returned regulatory authority for skilled-nursing facilities to the Secretary of the NCDHHS.

22. On March 10, 2020, Governor Cooper issued Executive Order No. 116 declaring a state of emergency and identifying the emergency area as the State of North Carolina. (Compl. ¶ 18; Executive Order No. 116, Compl., Ex. A at § 1.)

23. In sections 14, 15, 16, 18, 20, and 22 of Executive Order No. 116, Governor Cooper explicitly references the concurrence of the Council of State for provisions of the order, including granting “a right of entry into public places for assisting with or investigating potential COVID-19 cases or exposure” to local health departments and representatives of the Secretary of NCDHHS; “waiv[ing] restrictions related to the type of product or chemical concentration used to control

COVID-19 at facilities whose sanitation is regulated by NCDHHS, if conducted and handled in a safe manner and approved by the local health department in consultation with the Division of Public Health of NCDHHS”; “temporarily waiv[ing] North Carolina licensure requirements for health care and behavioral health care personnel who are licensed in another state, territory, or the District of Columbia to provide health care services within [North Carolina]”; “grant[ing] the Secretary of NCDHHS, or her designee, the authority to waive the formula requirements of 15A NCAC 18A .2901 and adjust aid-to-county funding, if a local health department’s resources are diverted in response to COVID-19”; “temporarily waiv[ing] Sections .0301 through .0317 of Chapter 58 in Title 1 in the North Carolina Administrative Code to the extent necessary to permit NCDHHS, DPS, and local governmental entities to enter into contracts to secure resources and equipment needed to respond to COVID-19”; and “temporarily waiv[ing] the regulatory requirements and suspend[ing] the enforcement of the statutory requirements under [N.C.G.S.] § 108A-54.2 for modifications of Medicaid Clinical Coverage Policy.” (Executive Order No. 116, Compl., Ex. A at §§ 14–16, 18, 20, and 22.)

24. The Governor issued Executive Order No. 118 on March 17, 2020. He sought concurrence from the Council of State on two provisions. (E-mails, Compl., Ex. H at 2.) Will Polk, Assistant General Counsel, sent an e-mail on behalf of the Governor to the members of the Council of State on Tuesday, March 17, 2020 at 12:41 p.m. requesting their concurrence by 1:15 p.m. on: (1) expanding unemployment benefits and flexibly applying or waiving certain filing requirements associated with

unemployment; and (2) limiting the sale of food, beverages, wine, beer, and liquor to take out, drive-through, and delivery. (E-mails, Compl., Ex. H at 2.)

25. In response, the Lieutenant Governor inquired whether the second provision had already been publicly announced by the Governor prior to his request for concurrence and later communicated that he concurred with the unemployment provisions in so far as the statutes were waivable by executive order, but did not concur with the restaurant provision, additionally inquiring as to limitations on the Governor's authority under Section 19.30(b)(5) of the EMA. (E-mails, Compl., Ex. H at 8, 15.) The responses of the other members of the Council of State to the Governor's request were: concurrence from Secretary of State Elaine Marshall and Attorney General Josh Stein as to both the unemployment and restaurant provisions (E-mails, Compl., Ex. H at 5, 12); Commissioner of Agriculture Steven Troxler, Superintendent Mark Johnson, and Commissioner of Insurance Mike Causey concurred with the unemployment provision, but not with the restaurant provision (E-mails, Compl., Ex. H at 19, 24, 29); and Treasurer Dale Folwell relayed concerns about ensuring the unemployment provisions were operational and in compliance with state and federal law and provided that he did not think the restaurant provisions should be mandated, just highly encouraged, and that both provisions needed further discussion before he would concur (E-mails, Compl., Ex. H at 16, 33). The record does not reflect any response from Auditor Beth Wood or Commissioner of Labor Cherie Berry (E-mails, Compl. at Ex. H).

26. In sum, the record reflects that six members of the Council of State concurred with the Governor in expanding unemployment benefits and flexibly applying or waiving certain filing requirements associated with unemployment and two members concurred with the provision limiting the sale of food, beverages, wine, beer, and liquor to take out, drive-through, and delivery. (E-mails, Compl. at Ex. H.)

27. Governor Cooper issued Executive Order No. 118 on Tuesday, March 17, 2020 to become effective as of 5:00 p.m. that day, with the provisions of section one restricting the sale of food and beverages to carry-out, drive-through, and delivery to remain in effect until March 31, 2020. (Compl. ¶¶ 20–21; Executive Order No. 118, Compl., Ex. B at § 1.) The other provisions of Executive Order No. 118 would “remain in effect until rescinded or superseded by another applicable Executive Order.” (Compl., Ex. B at § 5.)

28. Executive Order No. 118 cites the Governor’s authority regarding the closure of restaurants and bars as Section 19.30(c) of the EMA read in conjunction with 19.31(b)(2), which grants “authority to restrict or prohibit the operation of business establishments and other place [sic] to or from which people may travel or at which they may congregate.” (Compl., Ex. B at § 1(a)(i).)

29. Executive Order No. 118 also cited that the Governor, in compliance with Section 19.12(3)(e) of the EMA, had consulted the Division of Emergency Management and State Health Director to set “the appropriate conditions for quarantine and isolation in order to prevent the further transmission of disease,” (Compl., Ex. B at 2 (quoting N.C.G.S. § 166A-19.12(3)(e)), and to section 130A-145 of

the North Carolina General Statutes (the “Quarantine Statute”) noting that “the State Health Director has the power to exercise quarantine and isolation authority when public health is endangered,” (Compl., Ex. B at 2 (citing N.C.G.S. § 130A-145)). As indicated above, the Governor now contends that he relies exclusively on the EMA to issue the Executive Orders at issue and that any earlier reference to quarantine and isolation authority granted by the Quarantine Statute was both unnecessary and a mistake.

30. Executive Order No. 118 declared that the Governor “has sought and obtained the necessary concurrence from the Council of State consistent with the Governor’s emergency powers authority in [N.C.G.S.] § 166A-19.30(b) for Sections 2 and 3 of this Order, and reserves the right to act under [N.C.G.S.] §§ 166A-19.10 and 166A-19.30(a).” (Compl., Ex. B at 3.) Section 2 of Executive Order No. 118 expands unemployment benefits while Section 3 authorizes relaxing filing procedures regarding unemployment compensation applications. (Compl., Ex. B at §§ 2, 3.)

31. On March 27, 2020, Governor Cooper issued Executive Order No. 121 without the concurrence of the Council of State. Executive Order No. 121 initiated the “Stay at Home” mandate (Compl., Ex. C at § 1), and included a general directive that all businesses close, subject to a list of excepted “essential” businesses (Compl., Ex. C at § 2). The Governor cited Sections 19.30(c) and 19.31(b)(2) of the EMA as authority for prohibiting and restricting the operation of business establishments. Executive Order No. 121 specifies that the Governor found that each of the four alternative statutory bases existed to conclude “that local control of the emergency

was insufficient to assure adequate protection for lives and property of North Carolinians.” (Compl., Ex. C at 2 (citing N.C.G.S. § 166A-19.30(c).) Executive Order No. 121 carried forward the closures ordered by Executive Order Nos. 118 and 120. (Compl., Ex. C at § 2(H).) Executive Order No. 121 went into effect at 5:00 p.m. on Monday, March 30, 2020 and was to remain in effect for thirty days unless repealed, replaced, or rescinded. (Compl., Ex. C at § 7.)

32. In Section 4 of Executive Order No. 121, the Governor acknowledged that the impact of COVID-19 varied in parts of North Carolina:

Urban areas have seen more rapid and significant spread than most rural areas of the state. As such, the [Governor] acknowledges that counties and cities may deem it necessary to adopt ordinances and issue state of emergency declarations which impose restrictions or prohibitions to the extent authorized under North Carolina law, such as on the activity of people and businesses, to a greater degree than in this Executive Order. To that end, nothing herein is intended to limit or prohibit counties and cities in North Carolina from enacting ordinances and issuing state of emergency declarations which impose greater restrictions or prohibitions to the extent authorized under North Carolina law.

(Executive Order No. 121, Compl., Ex. C at § 4(A).)

33. On April 23, 2020, Governor Cooper issued Executive Order No. 135 without the concurrence of the Council of State. Executive Order No. 135 extended the “Stay at Home” mandate and declared that the provisions in sections 1, 4, and 5 of Executive Order No. 118; sections 1, 2, 3, and 5 of Executive Order No. 120; and all of Executive Order No. 121 would remain in effect until 5:00 p.m. on May 8, 2020. (Compl., Ex. D, at § 1.)

34. On May 5, 2020, Governor Cooper issued Executive Order No. 138 without the concurrence of the Council of State. Executive Order No. 138 initiated

Phase 1 of North Carolina’s phased reopening and became effective at 5:00 p.m. on May 8, 2020 to remain in effect until 5:00 p.m. on May 22, 2020, unless repealed, replaced, or rescinded. (Compl. at Ex. E.)

35. Executive Order No. 138 again recited that the Governor had made each of the four determinations defined in Section 19.30(c) to conclude “that local control of the emergency is insufficient to assure adequate protection for lives and property of North Carolinians.” (Compl., Ex. E at 3.) He then again invoked the provisions of 19.31(b)(1), (2), and (5) of the EMA for the Governor’s authority to “prohibit and restrict the movement of people in public places[;] . . . the operation of offices, business establishments, and other places . . . people may travel or . . . congregate . . .[; and] other activities or conditions, the control of which may be reasonably necessary to maintain order and protect lives or property during a state of emergency.” (Compl., Ex. E at 3.)

36. Section 8 of Executive Order No. 138 discusses its effect on local orders, stating “[m]ost of the restrictions in this Executive Order are minimum requirements, and local governments can impose greater restrictions,” and reasserts the Governor’s recognition of COVID-19’s uneven impact on the state of North Carolina. (Compl., Ex. E at § 8(A)(1).) Section 8 also states that all prohibitions and restrictions on retail businesses allowed to operate needed to be uniform and thus “amend[ed] all local prohibitions and restrictions imposed under any local state of emergency declarations to remove any language that sets a different maximum occupancy standard . . . or

otherwise directly conflicts” with the provisions set out in Executive Order No. 138. (Compl., Ex. E at § 8(A)(3).)

37. On May 20, 2020, Governor Cooper issued Executive Order No. 141 without the concurrence of the Council of State. Executive Order No. 141 initiated Phase 2 of the phased reopening of the economy and became effective at 5:00 p.m. on May 22, 2020, to expire on June 26, 2020, unless repealed, replaced, or rescinded. (Compl. at Ex. F.)

38. In Executive Order No. 141, the Governor again recited that he made the same determinations that local control of the state of emergency was insufficient, vesting the Governor with authority to assume the emergency powers of local governments and address the emergency on a statewide basis (Compl., Ex. F at 4 (citing N.C.G.S. § 19.30(c)), and invoked the same provisions of 19.31(b)(1), (2), and (5) enumerating those powers (Compl., Ex. F at 4).

39. On June 24, 2020, the Governor issued Executive Order No. 147 without the concurrence of the Council of State. Executive Order No. 147 extended Phase 2 through July 17, 2020 unless repealed, replaced, or rescinded. (Compl., Ex. G at § I.) The Governor again recited his determination that local control was insufficient and invoked the powers of section 19.31(b). (Executive Order No. 147, Compl., Ex. G at 4 (citing N.C.G.S. §§ 166A-19.30(c); -19.31(b)(1)–(2), (5).)

40. On July 28, 2020, the Governor issued Executive Order No. 153 without the concurrence of the Council of State. Executive Order No. 153 prohibits establishments that are permitted to be open from selling alcoholic beverages for

onsite consumption between the hours of 11:00 p.m. and 7:00 a.m. and was effective at 11:00 p.m. on July 31, 2020, to expire at 11:00 p.m. on August 31, 2020, unless repealed, replaced, or rescinded. Exec. Order No. 153, §§ 2, 8 (July 28, 2020). In addition to the same findings and invocation of authority in earlier orders, Executive Order No. 153 cites to the authority granted by Section 19.31(b)(3) of the EMA to restrict the possession, transportation, sale, purchase, and consumption of alcoholic beverages. Exec. Order No. 153 at 4.

41. On August 5, 2020, the Governor issued Executive Order No. 155, without the concurrence of the Council of State, extending Phase 2 and the effective date of Executive Order No. 141 until September 11, 2020. Exec. Order No. 155 (Aug. 5, 2020).

42. As authority, the Governor again asserted the four conditions existed under Section 19.30(c) granting him power to act under 19.31 and cited the specific powers exercised pursuant to 19.31(b)(1), (2), and (5), and noted his authority to amend regulations under 19.10(b)(2) and his power to amend or rescind local regulations when he has imposed prohibitions and restrictions enumerated in 19.31(b). Exec. Order No. 155 at 3–4.

IV. ANALYSIS

A. The Standard for Securing a Preliminary Injunction

43. “[A] preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation.” *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 577, 561 S.E.2d 276, 281 (2002). A court may

grant a preliminary injunction only when all of three factors are satisfied: (1) the plaintiff has shown a likelihood of success on the merits, (2) the plaintiff will sustain irreparable loss unless the injunction is issued, and (3) a careful balancing of the equities shows that the public interest supports issuing an injunction. *See Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977); *State v. Fayetteville St. Christian School*, 299 N.C. 351, 357–58, 261 S.E.2d 908, 913 (1980). The party moving for a preliminary injunction bears the burden of establishing entitlement to the relief. *Pruitt v. Williams*, 25 N.C. App. 376, 379, 213 S.E.2d 369, 371 (1975).

B. The Court Assumes Without Deciding that the Lieutenant Governor Has Standing

44. Lieutenant Governor Forest alleges that he is entitled to judicial relief which allows him to “execute the duties of his office, which includes the duty to concur or not concur with certain proposed gubernatorial actions like those found in the Shutdown Orders.” (Compl. ¶55.) The Governor contends that the Lieutenant Governor has not demonstrated the “injury” necessary to have standing to seek such relief.

45. Federal precedent grounded on *Raines v. Byrd*, 521 U.S. 811 (1997) teaches that a legislator or group of legislators’ standing to challenge legislation, including a claim of being excluded from a right to vote or participate, depends upon the degree to which the challengers, alone or collectively, have demonstrated the potential power to change the outcome of the relevant legislation or order. The Governor contends that this Court should apply that principle to find the Lieutenant

Governor lacks standing, particularly where the Lieutenant Governor neither seeks to represent the entire Council of State nor alleges that the a majority of the Council of State would not concur in the Executive Orders if the Court finds it necessary that they do so.

46. There is no similar North Carolina precedent under analogous facts to guide the Court's determination of whether a legislator or government official's exclusion from participation or vote constitutes an "injury" adequate to provide standing in North Carolina. In general, North Carolina courts are not necessarily bound by the strictures of federal standing doctrines. *Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002).

47. The Court, in its discretion, determines that any further consideration of the Lieutenant Governor's standing should await further briefing and argument in connection with the Governor's pending Motion to Dismiss. For purposes of the present Motion, the Court assumes without deciding that the Lieutenant Governor has standing to seek the relief he requests and resolves the Motion on other grounds.

C. The Governor's Power to Issue Executive Orders under the Emergency Management Act

48. The Governor is granted authority by several sections of the Emergency Management Act. The Motion focuses on two of those sections. Section 19.30(b) grants the Governor authority to take action in seven enumerated categories "with the concurrence of the Council of State." Section 19.30(c) grants the Governor power to issue certain prohibitions and restrictions "in addition to" powers otherwise granted to him by law. The Lieutenant Governor contends that any extraordinary

emergency order imposing such prohibitions or restrictions on a state-wide basis must only be issued with a concurrence of the majority of the Council of State.

49. Section 19.30(c)(1) provides:

In addition to any other powers conferred upon the Governor by law, during a gubernatorially or legislatively declared state of emergency, if the Governor determines that local control of the emergency is insufficient to assure adequate protection for lives and property because (i) needed control cannot be imposed locally because local authorities responsible for preservation of the public peace have not enacted appropriate ordinances or issued appropriate declarations as authorized by [N.C.G.S. §] 166A-19.31; (ii) local authorities have not taken implementing steps under such ordinances or declarations, if enacted or declared, for effectual control of the emergency that has arisen; (iii) the area in which the emergency exists has spread across local jurisdictional boundaries, and the legal control measures of the jurisdictions are conflicting or uncoordinated to the extent that efforts to protect life and property are, or unquestionably will be, severely hampered; or (iv) the scale of the emergency is so great that it exceeds the capability of local authorities to cope with it, the Governor has the following powers:

(1) To impose by declaration prohibitions and restrictions in the emergency area. These prohibitions and restrictions may, in the Governor's discretion, as appropriate to deal with the emergency, impose any of the types of prohibitions and restrictions enumerated in [N.C.G.S. §] 166A-19.31(b), and may amend or rescind any prohibitions and restrictions imposed by local authorities. Prohibitions and restrictions imposed pursuant to this subdivision shall take effect in accordance with the provisions of [N.C.G.S. §] 166A-19.31(d) and shall expire upon the earliest occurrence of either of the following: (i) the prohibition or restriction is terminated by the Governor or (ii) the state of emergency is terminated.

N.C.G.S. § 166A-19.30(c)(1).

50. The Lieutenant Governor contends that any powers under Section 19.30(c) remain subject to and cannot vary the requirement that the Governor seek the concurrence of the Council of State when taking action falling within the scope of

Section 19.30(b), and, in the event of an overlap between powers granted under Section 19.30(b) and Section 19.30(c), Section 19.30(b) must control. He then contends that the “Shutdown Orders” fall within the scope of Section 19.30(b) and are invalid unless a majority of the Council of State concurs in them. The Governor contends that the Lieutenant Governor seeks to impose a restriction that must be rejected by the clear legislative language that allows the Governor to act “in his discretion” in those limited instances where the Governor determines that local government action is insufficient to protect life and property threatened by the emergency.

51. The Lieutenant Governor promotes a more limited construction of the Governor’s authority under Section 19.30(c), contending that such is both temporary and confined to a local or regional area, and his authority to act only “in his discretion” does not extend to emergency orders with state-wide effect. The Governor contends the authority exists so long as the emergency exists and extends to the entire emergency area.

52. The Lieutenant Governor summarizes his contention as follows: “Local governments have authority to manage local emergencies. When local governments cannot sufficiently manage localized or regionalized emergencies, the Governor may manage those emergencies temporarily as if he were a local governmental body. When a statewide emergency requires extreme gubernatorial action, those actions require Council of State concurrence.” (Reply to Def.’s Br. & Resps. to Court’s Questions 12.) Effectively, the Lieutenant Governor’s position is that when acting

pursuant to Section 19.30(c), the Governor is proceeding in the nature of *parens patriae* for local government rather than in his capacity as the State’s chief executive carrying out responsibility for the overall response to a gubernatorially declared state-wide emergency.

D. Canons of Statutory Construction to Be Applied

53. When “the language of the statute is clear,” courts “conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.” *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). The Court’s primary intent in statutory construction is to ascertain the legislature’s intent from the wording of the statute as enacted, which does not necessarily have the exact effect as members of the legislature thought or intended. *Raleigh v. Mechs. & Farmers Bank*, 223 N.C. 286, 290, 26 S.E.2d 573, 575 (1943) (“courts are not controlled by what the Legislature itself apparently thought the proper interpretation should be, but the language employed, taken in connection with the context, the subject matter, and the purpose . . . must be considered”). The Court gives effect to words as chosen without inserting, deleting, or ignoring words in order to achieve a preferred construction. *Lunsford*, 367 N.C. at 623, 766 S.E. 2d at 301.

54. The Court assumes that no words within the statute were intended as surplusage, and where possible, the Court should give effect to all of the statute’s parts. *State v. Williams*, 286 N.C. 422, 431, 212 S.E.2d 113, 119 (1975) (citing *State v. Harvey*, 281 N.C. 1, 19, 187 S.E.2d 706, 718 (1972); *Clark v. Carolina Homes*, 189 N.C. 703, 710, 128 S.E. 20 (1925); *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505

(1921)). The Court should, however, avoid imposing such a literal interpretation of statutory language as to lead to absurd results when applying the statute. *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921) (citing *State v. Earnhardt*, 170 N.C. 725, 727, 86 S.E. 960 (1915); *Abernethy v. Board of Comm'rs*, 169 N.C. 631, 86 S.E. 577 (1915); *Fortune v. Buncombe Cty. Comm'rs*, 140 N.C. 322, 52 S.E. 950 (1905); *Keith v. Lockhart*, 171 N.C. 451, 88 S.E. 640 (1916); Black on Interpretation of Laws (2 ed.), pp. 23–66).

Where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended, and in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.

Hedrick v. Graham, 245 N.C. 249, 260–61, 96 S.E. 2d 129, 137 (1957) (quoting *U.S. v. Missouri P.R. Co.*, 278 U.S. 269, 278 (1929)).

E. The Lieutenant Governor Has Not Demonstrated that he Is Likely to Succeed on the Merits of his Claim Based on the Emergency Management Act

1. The record does not support an attack on the Governor's determination that local government action is insufficient to protect lives and property, thereby vesting authority in the Governor pursuant to section 19.30(c).

55. The Governor's additional powers under section 19.30(c) are conditioned on his determination that one of four statutorily enumerated circumstances render local governmental action insufficient to protect life and property. While the Lieutenant Governor has expressed certain disagreement with the Governor's findings, the Lieutenant Governor does not contend that none of the four statutory circumstances exist and concedes that the pandemic has state-wide effect. The

Lieutenant Governor argues that the Executive Orders are internally inconsistent in their findings that local government action is insufficient yet recognizing that some local authorities may be required to impose restrictions greater than those in the Executive Orders. The Court does not find these determinations to be inconsistent, but rather consistent with imposing a necessary “floor” to be applied state-wide, while leaving more restrictive requirements to those areas where the pandemic’s affect and risk of spread is more severe.

56. In opposition to the Motion, the Governor submitted declarations of D. Jordan Whichard IV, Director of Intergovernmental Affairs in the Office of the Governor; Erik A. Hooks, Secretary of the North Carolina Department of Public Safety; and Elizabeth Cuervo Tilson, MD, MPH, Chief Medical Officer for the NCDHHS. These declarations were submitted to support the Governor’s determination that local control of the pandemic was not adequate. Lieutenant Governor Forest did not respond to the declarations and did not argue against their assertions when given the opportunity to do so at the Hearing. Accordingly, the Court does not discuss them in greater detail, except to say that they do provide evidentiary support for the Governor’s findings of the existence of each of the four statutory factors specified in Section 19.30(c) as a condition of the Governor exercising any powers granted to local governments in Section 19.31. The Court concludes that the Lieutenant Governor has not demonstrated a likelihood of success on any claim that Section 19.30(c) has not provided the Governor with power to act within the scope of

that section. Accordingly, the Motion turns on the question of how the Governor must exercise those powers, not whether he has them in the first instance.

2. The Governor’s exercise of the additional powers under Section 19.30(c) is not confined to a local or regional area and may be exercised during the duration of the emergency declaration.

57. Section 19.30(c) provides that “if the Governor determines that local control of the emergency is insufficient” the Governor has the power “[t]o impose by declaration prohibitions and restrictions in the emergency area.” N.C.G.S. § 166A-19.30(c) (emphasis added). The “emergency area” is defined as “[t]he geographical area covered by a state of emergency.” N.C.G.S. § 166A-19.3(7). The Governor is empowered to declare an emergency and correspondingly to define the “emergency area,” which here he has determined is the entire State of North Carolina.

58. The Court finds no statutory language upon which it can base the limitation the Lieutenant Governor invites—to confine the Governor’s exercise of power under Section 19.30(c) to only a local or regional area. The language requires the opposite conclusion by suggesting that the Governor must act beyond the confines of the local jurisdiction when “the scale of the emergency is so great that it exceeds the capability of local authorities to cope with it.” N.C.G.S. § 166A-19.30(c)(iv).

59. The Emergency Management Act further provides that a state of emergency expires only when the declaration of the emergency is rescinded. N.C.G.S. §§ 166A-19.20(c); -19.30(c)(1). The Court concludes that the legislative intent is that the Governor’s authority under Section 19.30(c) continues so long as any of the four circumstances rendering local government action insufficient exists.

3. **If the determinations required by Section 19.30(c) have been met, the Governor can issue prohibitions and restrictions enumerated in Section 19.31(b).**

60. The Court must now reconcile various provisions of the Emergency Management Act, giving effect to each, if possible, to achieve the legislative intent. Those provisions include:

- A. The Governor is responsible for carrying out the provisions of the EMA except to the extent that powers are conferred exclusively on local governments, and the Governor has the power to issue necessary orders to do so. N.C.G.S. § 166A-19.10.
- B. During a gubernatorially declared emergency, the Governor has seven enumerated powers to be exercised with the concurrence of the Council of State, N.C.G.S. § 166A-19.30(b), which include the power to “control the congregation of persons in public places or buildings,” “to waive a provision of any regulation or ordinance . . . which restricts the immediate relief of human suffering,” and “to perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.” N.C.G.S. § 166A-19.30(b)(3)–(5).
- C. Local governments have power to issue emergency “prohibitions and restrictions” within their local jurisdiction, within five enumerated categories, including “the operation of offices, business establishments, and other places to or from which people

may travel or at which they may congregate,” or “upon other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during a state of emergency.” N.C.G.S. § 166A-19.31(b).

- D. “In addition to” his other powers, the Governor has authority to issue such prohibitions and restrictions “in his discretion” and “in the emergency area” when local governmental action is insufficient. N.C.G.S. § 166A-19.30(c); -19.30(c)(1).

61. The question arises as to whether Section 19.31(b) requires the concurrence of the Council of State in any event where provisions of an emergency executive order of state-wide application overlaps powers enumerated in Section 19.30(b).

62. The Lieutenant Governor asserts that the legislative intent is clear—any executive exercising extraordinary emergency authority must be subject to immediate oversight of a deliberative governing body. When making his argument, the Lieutenant Governor refers to the ability of local governments to oversee actions of their officers or agents. He seems to suggest that the Council of State is expected to fulfill a similar role through requiring that it concur in the Governor’s emergency orders. The defect in the argument is that members of the Council of State, although elected, are also members of the executive branch, and any power under the Emergency Management Act, whether exercised by the Governor or the Council of State remains subject to legislative oversight by the General Assembly. It is not

determinative that such legislative oversight may require a super-majority vote necessary for a veto override.¹

63. The Lieutenant Governor also argues that the Governor's exercise of authority under Section 19.30(c) without the concurrence of the Council of State raises constitutional issues related to the separation of powers. At the same time, the Lieutenant Governor concedes that the legislature has provided sufficient guidance and retained sufficient oversight to pass constitutional authority when delegating power to local governments and to the Governor so long as he acts with the concurrence of the Council of State.

64. The constitutional doctrine of separation of powers requires that the General Assembly when delegating powers to the executive branch "provide adequate guiding standards to govern the exercise of the delegated powers," *In re Guess*, 327 N.C. 46, 53, 393 S.E.2d 833, 837 (1990) (quotations and citation omitted), which must be "as specific as the circumstances permit." *N.C. Turnpike Auth. v. Pine Island, Inc.*, 265 N.C. 109, 115, 143 S.E.2d 319, 323 (1965). While there have been subsequent amendments, an earlier iteration of the Emergency Management Act was upheld against a separation of powers challenge. *State v. Dobbins*, 277 N.C. 484, 500, 178 S.E.2d 449, 459 (1971).

65. The legislature has expressly conditioned the Governor's exercise of powers under Section 19.30(c) on a determination of specific criteria that local

¹ The Court construes the Emergency Management Act as it is currently in force and has neither considered nor been guided by bills considered but not enacted in the most recent legislative session.

governmental action is insufficient to protect lives and property threatened by an emergency. The Court concludes that based on the current record, the Lieutenant Governor has not shown any likelihood of success on the merits on any claim that the grant of authority to the Governor under Section 19.30(c) is unconstitutional as a violation of the separation of powers.

66. The Lieutenant Governor further contends that allowing the Governor to act under Section 19.30(c) without the concurrence of the Council of State renders Section 19.30(b) meaningless. That argument assumes that the Governor has power under Section 19.30(c) equal in all instances to the powers granted by Section 19.30(b) except in the requirement of the concurrence of the Council of State.

67. Section 19.30(c)(1) clearly vests the Governor with the power to issue limited prohibitions and restrictions within the scope of Section 19.31(b) “in his discretion.” But those powers first depend upon a determination that one of the four factors exists to render local governmental action insufficient. If those determinations cannot be made, the Governor must act pursuant to Section 19.30(b) and secure the concurrence of the Council of State. When enacting Section 19.30(c), the legislature could have similarly required the Governor to assume control of a local emergency and issue orders with the concurrence of the Council of State. However, the legislature chose statutory language empowering the Governor to act “in his discretion,” and making clear that his power to do so is “in addition to any other powers conferred upon the Governor by law.” The Lieutenant Governor’s construction would render that language a nullity.

68. There is an admitted and clear overlap between the scope of powers enumerated in Sections 19.30(b) and 19.31(b), and the prohibitions and restrictions in the Executive Orders may fall within each. But the Court concludes that the overlap is not to such a degree as to justify the Court's disregard of the legislative mandate that when local government responses are insufficient the Governor can issue prohibitions and restrictions in his discretion as long as they remain within the scope of the categories enumerated in Section 19.31(b).

69. Accordingly, the Court concludes that the Lieutenant Governor has not demonstrated that he is likely to succeed on the merits of his claim that the Governor has exceeded his statutory authority when issuing the Executive Orders without the concurrence of the Council of State.

4. To the extent that it can or should be considered, the legislative history does not compel a different conclusion.

70. The Lieutenant Governor submitted legislative history at the Court's request, and the Court appreciates his substantial effort in doing so. The Court has concluded that it does not require reference to any such legislative history as it has been able to construe the Emergency Management Act to the extent necessary to resolve the Motion based on clear statutory language.

71. Should it become necessary to further consider the legislative history in the course of this litigation, the Court will then invite further briefing and argument. To the limited extent that the Court has reviewed that history and heard arguments of counsel, its initial impression is that the history demonstrates while the legislature has consistently envisioned some involvement of the Council of State in emergency

management, the extent of its involvement has diminished over time while the Governor's responsibility and authority have increased.

F. The Lieutenant Governor Is Not Likely to Succeed on the Merits of Any Claim that the Executive Orders Violate the Quarantine Statute

72. The Executive Orders initially referred to the Quarantine Statute as a source of authority, but the Governor now makes clear that he does not rely on that statute in any way when continuing the Executive Orders in force. The Lieutenant Governor has also acknowledged provisions of the Quarantine Statute, if otherwise applicable, during an emergency might be suspended by orders issued pursuant to the Emergency Management Act.

73. When applicable, the Quarantine Statute requires certain procedural safeguards, including time restrictions on any quarantine order issued by the State Health Director and provisions requiring notice of an affected person's right to seek prompt judicial review. The Lieutenant Governor indicates he has been unable to locate any act by the State Health Director under the Quarantine Statute even though the early Executive Orders authorized such action.

74. In presenting his argument, the Lieutenant Governor contends that the Governor's Emergency Orders may be considered a "quarantine" because bars, gyms, and other businesses have been ordered closed and individual citizens have been isolated to the extent they have been unable to access those businesses. The Court accepts the Governor's narrower construction that the Executive Orders do not

impose a “quarantine,” as the Executive Orders do not order the isolation of persons who have been infected and present a risk of spreading the virus.

75. The Court concludes that the Lieutenant Governor has not demonstrated that he is likely to succeed on the merits of any claim that the Executive Orders are invalidated, in whole or part, by the Quarantine Statute.

V. CONCLUSION

76. For the foregoing reasons, the Court concludes that the Lieutenant Governor has failed to demonstrate that he is likely to succeed on any claims for relief stated in his Complaint. Therefore, the Court is not required to consider whether he has satisfied the additional elements of proof necessary to secure preliminary injunctive relief.

77. Accordingly, the Lieutenant Governor’s Motion for a Preliminary Injunction is DENIED.

IT IS SO ORDERED, this the 11th day of August, 2020.

/s/ James L. Gale

James L. Gale
Judge Presiding